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No. 04-1054

In the
Supreme Court of the United States

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

TERESA B.,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF OF THE STATES OF ALABAMA, DELAWARE, HAWAII, ILLINOIS, IOWA, INDIANA, KANSAS, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEVADA, NEW MEXICO, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

Troy King
Attorney General

Scott L. Rouse
Deputy Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

March 7, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801

ROBERT J. SPAGNOLETTI
ATTORNEY GENERAL
DISTRICT OF COLUMBIA
John A. Wilson Bldg.
1350 Pennsylvania Ave. N.W.
Suite 409
Washington, D.C. 20009

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
James R. Thompson Ctr.
100 W. Randolph Street
Chicago, IL 60601

TOM MILLER
ATTORNEY GENERAL
STATE OF IOWA
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, IA 50319

STEVE CARTER
ATTORNEY GENERAL
STATE OF INDIANA
302 W. Washington St
IGCS – 5th Floor
Indianapolis, IN 46204

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

THOMAS F. REILLY
ATTORNEY GENERAL
STATE OF MASSACHUSETTS
One Ashburton Place
Boston, MA 02108

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
207 West High Street
Jefferson City, MO 65101

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
100 N. Carson Street
Carson City, NV 89701

PATRICIA A. MADRID
ATTORNEY GENERAL
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, NM 87504-1508

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-3428

HENRY D. MCMASTER
ATTORNEY GENERAL
STATE OF SOUTH CAROLINA
P.O. Box 11549
Columbia, SC 29211

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
Capitol Station
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
State Capitol, Room 26-E
Charleston, WV 25305

PATRICK J. CRANK
ATTORNEY GENERAL
STATE OF WYOMING
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Does the Fifth Amendment privilege against self-incrimination permit the parent of a missing child who has been abused or neglected to defy an order issued by a juvenile court having protective jurisdiction over the child pursuant to the State's regulatory regime for protection of such children by refusing to disclose the child's last known location? *See* Pet. at i.

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INTEREST OF AMICI CURIAE

The 21 States joining in this brief as *amici curiae* have a solemn obligation to ensure the welfare of the children that reside within their respective borders. Fortunately, most children are brought up in safe and nurturing environments by competent and loving parents, thus obviating the need for States to take protective action. Other children, however, are not so lucky. Where a State encounters a neglectful or abusive parent, it has a duty to step in and protect innocent young life.

This case illustrates precisely how an unfit parent can disrupt and endanger the life of her child, and then stymie a State's efforts even to locate the child in order to protect him. Here, a mother who had kidnapped her child from protective state custody invoked the Fifth Amendment to justify her refusal to disclose to state social workers the missing child's whereabouts. Citing this Court's decision in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), for support, the Maryland Court of Appeals has now essentially endorsed the mother's stonewalling. The *amici* States respectfully but adamantly disagree with the Maryland court's decision and contend that the Court of Appeals has fundamentally misunderstood *Bouknight* – which, *amici* maintain, actually requires a contrary result here. In any event, the *amici* States submit (i) that there exist equally effective, but less socially harmful, means of enforcing the Fifth Amendment, and (ii) that the protections of the Fifth Amendment are (like other constitutional rights) not absolute and should give way, at least in exigent circumstances, to the States' paramount interest in protecting endangered children.

As this brief will show, the meaning of this Court's decision in *Bouknight* is seriously in doubt. The Court should grant *certiorari* in this case to clarify that decision – and, in so doing, clarify the interplay between a parent's Fifth Amendment rights, on the one hand, and the States'

compelling interest in protecting endangered children, on the other.

INTRODUCTION

This case arises against a rather startling backdrop. More and more, it seems, children are under attack – from sexual predators, child pornographers, child abusers, and all manner of other evildoers. *See, e.g., McKune v. Lile*, 536 U.S. 24, 32-33 (2002) ("[T]he victims of sexual assault are most often juveniles."); *New York v. Ferber*, 458 U.S. 747 (1982) (recognizing the insidious and deeply damaging effects of child pornography); *Deshaney v. Winnebago Co. Dep't of Social Services*, 489 U.S. 189 (1989) (young boy, "poor Joshua," severely beaten by his own father).

The first line of defense in safeguarding the Nation's children, of course, is the family unit. We rely on (and rightly expect) parents to take care of and protect their minor children. *See Reno v. Flores*, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring) ("[I]n our society, children normally grow up in families, not in governmental institutions."). Most parents, of course, discharge that obligation lovingly and dutifully, if not always perfectly. Unfortunately, however, that is not uniformly the case. Too often – and seemingly increasingly – society confronts parents who have turned on their children by abandoning, neglecting, abusing, or even killing them.

In the month or so since the State of Alabama undertook the drafting of this brief, news accounts of parents abandoning or abusing their children (or much worse) have flashed the following headlines:

- "Police Say Mother Confessed To Starving Her Children To Death"[1];
- "Capital charges in baby's death: Autopsy results indicate baby was born alive and then drowned"[2];
- "Couple accused of torturing children: Allegedly pulled out kids' toenails, beat them with hammers"[3];
- "Police: Girl locked in room for over a year"[4];
- "Coroner: Girl was Tortured: 4-year-old's injuries 'beyond child abuse'"[5]; and
- "Father charged in death of baby"[6]

These are not stories that we went digging for. Regrettably, we didn't have to; they couldn't be missed. The prevalence of such stories – depicting the often-terrible things that parents do to their own children –

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[1] THE ASSOCIATED PRESS, Feb. 5, 2005, *available at* http://www.waff.com/Global/story.asp?s=2903984.

[2] Ryan Dezember, MOBILE REGISTER, Feb. 12, 2005, *available at* http://www.al.com/news/mobileregister/index.ssf?/base/news/11 08203605260910.xml.

[3] THE ASSOCIATED PRESS, Feb. 4, 2005, *available at* http://www. cnn.com/ 2005/US/02/03/family.torture/.

[4] THE ASSOCIATED PRESS, Feb. 10, 2005, *available at* http://www .cnn.com/2005/US/02/10/girl.abuse.ap/.

[5] Carol Robinson and Chanda Temple, THE BIRMINGHAM NEWS, Feb. 23, 2005, *available at* http://www.al.com/news/birmingham news /index.ssf?/base/news/110915435742241.xml.

[6] Connie Baggett, MOBILE REGISTER, Feb. 22, 2005, *available at* http://www.al.com/news/mobileregister/index.ssf?/base/news/11 09067593279570.xml.

serves, if nothing else, to underscore the real-world importance of this case.

STATEMENT OF FACTS

In 1996, the Baltimore City Department of Social Services ("BCDSS") took 5-year-old Ariel into custody to protect him from his mother, Teresa B. Pet. App. 1a. Based on Teresa B.'s failure to provide treatment for her son's severe medical condition, BCDSS filed a petition deeming Ariel a "Child in Need of Assistance." Pet. App. 2a. After the juvenile court placed Ariel in protective custody with BCDSS, but before an adjudicatory hearing could be held, Teresa B. kidnapped Ariel and absconded. *Id.* Teresa B. eluded Maryland child welfare authorities for more than three years until, finally, she was caught in 2000. *Id.* Despite Teresa B.'s refusal to disclose Ariel's whereabouts, BCDSS managed to locate him; the agency again placed him in protective custody and, thereafter, in foster care. *Id.* In January 2001, however, Ariel's foster parents discovered that he was missing (again). *Id.* Teresa B. could not be located either, and in the Court of Appeals' words, "it was widely speculated that Teresa again had fled with Ariel." *Id.*

When, later in 2001, Teresa B. was apprehended alone, she again refused to disclose Ariel's location. *Id.* The juvenile court judge pointedly questioned her as to Ariel's whereabouts; Teresa B., however, invoked the Fifth Amendment and refused to answer the court's queries. *Id.* The court found Teresa B. in contempt and ordered her jailed. In the ensuing months, Teresa B. was brought before the court numerous times, and on each occasion was given the opportunity to purge the contempt. Each time, she refused, citing the Fifth Amendment. *Id.*

In June 2002, the juvenile court judge gave Teresa B. yet another opportunity to disclose Ariel's whereabouts. This time, she responded that, because she had been incarcerated during the preceding ten months, she did not know her son's present location. *Id.* The judge then

asked Teresa B., in the alternative, at least to provide Ariel's last known location. She again refused to respond, invoking the Fifth Amendment. Pet. App. 3a-4a. Teresa B. issued a similar refusal at a hearing in September 2002. Pet. App. 4a. Despite Teresa B.'s recalcitrance, BCDSS was finally able to locate Ariel, whom they placed with relatives. *Id.*

REASONS FOR GRANTING THE WRIT

Just as it is true that, in the normal course, children "grow up in families, not in governmental institutions," Justice O'Connor has observed that the "government's failure to take custody of a child whose family is unable to care for her may also effect harm." *Reno v. Flores*, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring). The question presented here is whether the very person from whom a State is seeking to protect a neglected child may unilaterally thwart the State's efforts to prevent the very "harm" to which Justice O'Connor alluded. Specifically, the question is whether a mother who has at least once (and probably twice) kidnapped her 5-year-old son from protective state custody may invoke the Fifth Amendment in refusing to tell child-welfare personnel the child's last known location. That question, as we hope we have shown, is not merely an academic one.

I. The Meaning Of This Court's Decision In *Bouknight* Is Seriously In Doubt And Requires Clarification.

In *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), this Court held that the parent of an abused or neglected child may not invoke the Fifth Amendment as a basis for refusing a court's order to produce the missing child. In this case, the Court is asked to answer a question left open by *Bouknight* – specifically, whether the parent may refuse on Fifth Amendment grounds to disclose to a juvenile court judge (as an alternative to production) the child's last known location.

Initially, therefore, there is the question whether this case fits within the rationale – if not the square holding – of this Court's decision in *Bouknight*. The Maryland Court of Appeals concluded, unanimously, that it does not. Indeed, that court found *Bouknight*'s reasoning to be positively "inapplicable" to the facts presented here. Pet. App. 9a; *id.* at 10a ("not applicable"). It offered two reasons for so concluding. As we will show, neither withstands scrutiny. Clearly, where, as here, (i) the state high court seems so convinced of its reading of *Bouknight*, and (ii) 21 States are equally convinced that that court has fundamentally misunderstood *Bouknight*, the scope of this Court's decision is in need of clarification.

A. For Fifth Amendment Purposes, There Is No Meaningful Distinction Between Production Of A Child And Disclosure Of The Child's Whereabouts.

As its first basis for refusing to follow *Bouknight*'s lead, the Maryland court drew a bright-line distinction between the act of producing a child, on the one hand, and the act of communicating the child's whereabouts, on the other. Characterizing (but not quoting) the decision in *Bouknight*, the Court of Appeals found that this Court had held that "[p]roducing [a] child pursuant to a court order ... was not a sufficiently testimonial communication and therefore fell outside the boundaries of the Fifth Amendment's protections." Pet. App. 10a. The Maryland court later reiterated its understanding that *Bouknight* had held that the "act of producing [a] child was not a testimonial communication, but rather an act of production that fell outside the Fifth Amendment's protection." Pet. App. 11a.

With respect, that is not at all what this Court said in *Bouknight*. To the contrary, all nine Justices – majority and dissenters alike – agreed that *Bouknight* was decided on the express assumption that the act of producing a child pursuant to a court order ***is*** a "testimonial" act for

Fifth Amendment purposes. For those in the majority, Justice O'Connor wrote as follows:

> The possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production. *Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege,"* Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.

493 U.S. at 555-56 (internal citations omitted) (emphasis added). Justice Marshall, writing for himself and Justice Brennan in dissent, likewise emphasized that the Court had "correctly assume[d]" – not just assumed, but *correctly* assumed – "that Bouknight's production of her son to the Maryland court *would be testimonial* because it would amount to an admission of Bouknight's physical control over her son." *Id.* at 563 (Marshall, J., dissenting) (emphasis added). In the face of this Court's very clear acknowledgements that it was deciding *Bouknight* on the premise that "testimony" (in the Fifth Amendment sense) was at stake, the Court of Appeals' contrary characterization is puzzling. (Notably, the Court of Appeals' characterization of *Bouknight* is supported not by any language in this Court's written opinions but, instead, only by a very generic pinpoint citation to pages 554-59 of the decision. *See* Pet. App. 10a, 11a.)

So, what this Court actually said in *Bouknight* was (i) that a parent's act of producing her child *is* a sufficiently "testimonial" act to trigger the Fifth Amendment's coverage – *but* (ii) that, in the circumstances presented, the Fifth Amendment posed no bar to the compulsion of that testimonial act. And the reason that there was no Fifth Amendment bar, this Court held, was because (i)

the protection of abused, neglected, and missing children is a valid "noncriminal, regulatory" objective, and (ii) "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." 493 U.S. at 556. Thus, the Court concluded, "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement" like child protection. *Id.* at 557; *accord id.* at 558 ("When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is greatly reduced.").

This Court "readily" concluded that those principles "appl[ied] to th[e] case" before it. *Id.* at 559. Specifically, the Court held that once Maurice – the missing child in *Bouknight* – "was adjudicated a child in need of assistance" by the State, "his care and safety became the particular object of the State's regulatory interests." *Id.* To say that the *Bouknight* Court's recognition of the State's valid civil-regulatory interest in the welfare of abused and neglected children maps directly onto this case would be an understatement. *Bouknight* involved the very same state agency – the Baltimore City Department of Social Services – that has intervened here to protect Ariel's well-being. Of course, that agency operates today pursuant to the same laws that this Court cited in *Bouknight* as evidence of the State's valid civil-regulatory interests. *See id.* (citing Md. Cts. & Jud. Proc. Code. Ann. §§ 3-801(e), 3-804(a) (Supp. 1989)). So when, in support of its conclusion that Marlyand's protection of missing children served a valid non-criminal purpose, the *Bouknight* Court quoted a Maryland state court's observation that it had "jurisdiction to require at all times to know the whereabouts of the minor child," *id.*, it goes without saying that the observation applies equally here.

Far from being "inapplicable" here (Pet. App. 9a), *Bouknight*'s reasoning seems to be very nearly on point.

B. Teresa B. Should Not Be Rewarded For Her Decision To Kidnap And Abscond With Ariel, Rather Than To Submit To The Jurisdiction Of The State Courts.

The Maryland court offered a second basis for distinguishing *Bouknight*: Whereas the mother in that case "had consented to the conditions placed upon her" by the state child-protection agency, Teresa B. – the mother here – has not. Pet. App. 10a. Teresa B., the Court of Appeals noted, "did not consent to the court's or BCDSS's jurisdiction over Ariel and never agreed to any terms that would allow her to retain any degree of lawful custody over Ariel." Pet. App. 12a. Thus, the court said, "Teresa, unlike Bouknight, may not be said to have submitted to the regulatory regime of the BCDSS." *Id.*

While those may well be accurate statements of fact, it is inconceivable to us why the distinction the Maryland court drew should benefit Teresa B. Rather than submitting to the state agency's supervision, *Teresa B. kidnapped and absconded with Ariel – at least once, and in all probability twice.* As the Court of Appeals itself reported, "[a]fter the [juvenile] court entered an order placing Ariel in protective custody but before an adjudicatory hearing could be held, Teresa absconded with Ariel." Pet. App. 2a. Later, "[a]fter three years of eluding the authorities," Teresa B. was located and arrested. *Id.* Although Teresa B. refused (then, as later) to disclose Ariel's whereabouts, the State managed to find him, and once again placed him in protective custody and ultimately in foster care. There he stayed until, one morning, Ariel's foster parents "discovered that [he] was missing from his bedroom." *Id.* "Attempts to locate his mother were unsuccessful, and it was widely speculated that Teresa again had fled with Ariel." *Id.*

The Maryland court's distinction of *Bouknight* sets the world on its head: The parent (Bouknight) who at least partially cooperates with the State by consenting to its supervision *does not* get Fifth Amendment protection,

while the parent (Teresa B.) who thumbs her nose at child-welfare personnel – going so far as to kidnap her own child – *does* get that protection. The Court of Appeals' reasoning creates the most perverse incentive imaginable for abusive parents (namely, kidnap and stonewall), and, with respect, cannot possibly be a valid inference from *Bouknight*. Surely, just the opposite is true. If the State's valid civil-regulatory interest in protecting abused and neglected children was sufficient to override Bouknight's Fifth Amendment privilege, then it must also be sufficient to supersede the interests of Teresa B., who has, if anything, proven herself less trustworthy, less cooperative, and less interested in her child's well-being.

II. The Court Of Appeals' Additional Justifications For Its Decision Do Not Withstand Scrutiny.

Aside from its efforts to finesse *Bouknight*, the Court of Appeals offered two additional bases for its decision. Neither is persuasive.

A. To The Extent There Exists A Concern About The State Using Parents' Statements For Law-Enforcement Purposes, Suppression, Not Court-Sanctioned Stonewalling, Is The Appropriate Remedy.

Although it expressly acknowledged that "the juvenile court's primary objective was to determine Ariel's location for his safety" – the very civil-regulatory interest validated in *Bouknight* – the Court of Appeals emphasized, as a basis for applying the Fifth Amentment, that "[i]t was clear that his mother's statements not only could be used to locate the child, but also to gather evidence for law enforcement purposes as to how Ariel left the foster home" and "to discover what role Teresa may have had in Ariel's disappearance." Pet. App. 8a. There are two problems with the court's reasoning.

First, that was Justice Marshall's view in *Bouknight*, and, with respect, that view was decisively rejected.

Indeed, the Court of Appeals' reliance on what it perceived to be the "real" purpose underlying the juvenile court's order to disclose the Ariel's last known location follows straightaway from the following passage of Justice Marshall's dissenting opinion: "Virtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly or, as in this case, *solely* to the avowed non-criminal purpose of the regulations. If one focuses instead on the practical effects, the same scheme could be seen as facilitating criminal investigations." 493 U.S. at 568 (Marshall, J., dissenting). But writing for a seven-member majority and, notably, citing the same Maryland statutes at issue here, Justice O'Connor expressly took a different view, one that applies equally here:

> Similarly, BCDSS' efforts to gain access to children, as well as judicial efforts to the same effect, do not "focu[s] almost exclusively on conduct which was criminal." [*California v.*] *Byers*, 402 U.S. [424,] 454, 91 S.Ct. [1535,] 1551 (1971) (Harlan, J., concurring in judgment). Many orders will arise in circumstances entirely devoid of criminal conduct. Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce that request through exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation. See Maryland Cts. & Jud.Proc.Code Ann. § 3-814(c) (1984). *This case provides an illustration: concern for the child's safety underlay the efforts to gain access to and then compel production of Maurice.*

493 U.S. at 560-61 (emphasis added). Plainly, the Court of Appeals' emphasis here on what it perceived to be a prosecutorial motive lurking beneath the surface of the juvenile court's disclosure order cannot be squared with *Bouknight*.

Second, and in any event, if, as the Court of Appeals' opinion indicates, there is a concern with the State's use of parents' testimony for "law enforcement" or prosecutorial purposes (Pet. App. 8a), there is a readily available means – short of court-sanctioned stonewalling – of vindicating that concern. Indeed, it is a means to which this Court adverted in *Bouknight* and that the State of Maryland candidly acknowledges here (Pet. at 16). In *Bouknight*, this Court excused itself from "defin[ing] the precise limitations that may exist upon the State's ability to use the testimonial aspects of [a parent's] act of production in subsequent criminal proceedings," but emphasized that the "imposition of such limitations [was] not foreclosed." 493 U.S. at 561. The Court observed that a State's valid civil-regulatory requirement "in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment's protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution." *Id.* at 561-62.[7]

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[7] Notably, the Court of Appeals seems to have misconstrued this passage of *Bouknight*, and then used its misconstruction to support a rule absolutely prohibiting a State from requiring a parent to disclose a missing child's whereabouts. In support of its view (which we have already critiqued at some length, *see supra* at 6-9), that *Bouknight* would have come out the other way had the issue there been testimony (in the traditional sense) rather than production, the Court of Appeals recited part of the above-quoted passage – that a State's noncriminal regulatory requirement "may neither compel incriminating testimony nor aid a criminal prosecution." Pet. App. 14a-15a. By truncating the full sentence, the Court of Appeals made it seem as if this Court had used the word "may" in its mandatory sense to mean "must." In context, however – given that what follows is the statement, "but the Fifth Amendment's protections are not therefore necessarily unavailable ...." – it seems clear enough that, in fact, this Court was using the word "may" in its conditional sense to mean "might." The Court of Appeals' misunderstanding of this aspect of *Bouknight* further undermines its distinction of that case – and further underscores the need for clarification from this Court.

The sensible solution, therefore, to any concern about requiring parents like Teresa B. to "participate in their own criminal prosecutions," *id.* at 570 (Marshall, J., dissenting), is to permit those parents to seek suppression of their statements in the event a prosecution is eventually brought. That solution serves *both* the State's overriding (and immediate) interest in locating the missing child *and* the parent's interest in not being "compelled in any criminal case to be a witness against himself," U.S. Const. amend. V, and is surely preferable to the Court of Appeals' wooden approach, which completely sacrifices the former to the latter. *Cf. Chavez v. Martinez*, 538 U.S. 760, 766-70 (2003) (noting that the "core" of the Fifth Amendment's Self Incrimination Clause is the privilege against the *use in a criminal trial* of a compelled statement); *id.* at 777 (Souter, J., concurring in the judgment) (same).

It bears emphasis in closing that, at least in the child-protection situation, this "suppression" solution is manifestly superior to the "immunity" solution suggested by the Court of Appeals (Pet. App. 17a-18a). As Maryland's petition for certiorari makes clear (Pet. at 17), child-welfare agencies – whose mission is to protect abused and neglected children, not to prosecute criminals – oftentimes will not be authorized to grant immunity from criminal prosecution. Because time is of the essence when the task is securing the welfare of a missing child, the Court should be slow to adopt any rule that would require a social worker to track down and contact the local DA, and then convince her of the merits of a grant of immunity – all before acquiring information that he needs immediately.

B. The Fifth Amendment's Protections Are Not Absolute And Must Give Way In Exigent Circumstances To The States' Compelling Interest In Protecting Endangered Children.

For the proposition that the State's "extremely important" interest in protecting vulnerable children does

not "justify abandonment of our constitutional foundations," the Court of Appeals pointed to what it took to be the "unequivocal" and "exception[less]" language of the Fifth Amendment. Pet. App. 16a. The court's analysis in this respect is misguided in several respects. First, all constitutional rights are subject – if only in rare circumstances – to competing considerations. The First Amendment, which has enjoyed something of a privileged position among constitutional provisions,[8] no less than the Fifth, is phrased in "unequivocal" terms: "Congress shall make no law ...." U.S. Const. amend. I. Nonetheless, "[t]his Court has frequently denied that First Amendment rights are absolute ...." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976); *see also Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute ...."). Even, for instance, in the particularly sensitive area of political speech, this Court has held that the First Amendment must sometimes yield to compelling state interests. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003). So, too, in the free-exercise context, individual rights often give way to generally applicable state laws. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). There is no need to multiply examples to show, as a baseline, that the Court of Appeals' reliance on the Fifth Amendment's seemingly exceptionless language rests on oversimplification.

The second problem with the Court of Appeals' analysis is related. The State's interest in safeguarding the welfare of children (who are among its most vulnerable citizens) is not just "important," as the Maryland court said. On the contrary, this Court has repeatedly affirmed, in various contexts, that the

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[8] *See e.g., Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264-65 (1986) (quoting Justice Cardozo's majority opinion in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), to reiterate that "freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom'").

protection of children is indeed a "compelling" state interest. *See Denver Area Educational Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996); *Maryland v. Craig*, 497 U.S. 836, 853 (1990); Pet. at 13-14 (collecting cases). That fact is important, of course, because under this Court's doctrine, fundamental constitutional rights may be compromised only – as we said earlier, in rare circumstances – where there is a showing that "'the infringement is narrowly tailored to serve a *compelling* state interest.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302) (emphasis added). Protecting the welfare of innocent children, this Court has made plain, is just such an interest.

Which leads to the third problem with the Court of Appeals' statement of Fifth Amendment absolutism. The rule that the States seek here is indeed "narrowly tailored." It would not, as the Maryland court seemed to believe, work an "abandonment of our constitutional foundations." App. 16a. Not in the least. Neither Maryland nor the *amici* States are asking for a free pass. Rather, the minor accommodation sought here – if it can even be called that – is limited in two important respects. First, it would not apply in all (or even most) situations in which an individual seeks to refuse requests for information. Rather, it would apply only in situations, like the one here, that present something akin to "exigent circumstances" (as that term has come to be used in the related Fourth Amendment context). *See, e.g., United States v. Wilson*, 306 F.3d 231, 238-39 (5th Cir. 2002) (possible danger to children cited as an "exigent circumstance" justifying a warrantless search by police); *White v. Pierce County*, 797 F.2d 812, 815-16 (9th Cir. 1986) (finding that the likely abuse of a child was an "exigent circumstance" that justified taking the child into protective custody without a court order). And second, as noted above (*see supra* at 12-13), the requirement that a parent who is unwilling to produce a child under state care disclose the child's last known location could be

tempered, when the situation arose, by a rule allowing the parent to seek suppression in a subsequent criminal prosecution.

CONCLUSION

For the foregoing reasons, the *amici* States submit that the Court should grant writ of *certiorari*.

Respectfully submitted,

Troy King
Attorney General

Scott L. Rouse
Deputy Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

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